STATE OF WISCONSIN CIRCUIT COURT DANE COUNTY
BRANCH 9

THE LEAGUE OF WOMEN VOTERS OF WISCONSIN, DISABILITY RIGHTS WISCONSIN, INC., BLACK LEADERS ORGANIZING FOR COMMUNITIES, GUILLERMO ACEVES, MICHAEL J. CAIN, JOHN S. GREENE, and MICHAEL DOYLE,

Plaintiffs,

v.

DEAN KNUDSON, JODI JENSEN, JULIE M. GLANCEY, BEVERLY GILL, ANN S. JACOBS, MARK L. THOMSEN, MEAGAN WOLFE, and TONY EVERS,

Defendants.

Case No. 19-CV-00084

Case Code 30701 & 30704

PLAINTIFFS' BRIEF IN OPPOSITION TO MOTIONS TO DISMISS BY WISCONSIN ELECTIONS COMMISSION DEFENDANTS AND BY DEFENDANT-INTERVNOR WISCONSIN LEGISLATURE AND PLAINTIFFS' REPLY BRIEF IN SUPPORT OF THEIR MOTION FOR TEMPORARY INJUNCTION

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INTRODUCTION

The December 2018 Extraordinary Session was convened unlawfully. Absent a call from the Governor (which did not occur in December 2018), the Constitution allows the Legislature to meet only at a "time … provided by law." Wis. Const. art. IV, § 11. There is no "law" that "provided" for the December 2018 Extraordinary Session. It is that simple. The Legislature's brief labors to conceal this fact.[1] In its efforts, it ignores the constitutional text, distorts the statutory language, and places unbearable weight on 2017 Enrolled Joint Resolution 1, which embodies a legislative convenience, not legal authority.[2]

Plaintiffs' claim succeeds on the merits. Dismissal should not be granted for failure to state a claim, either broadly, as sought by the Legislature (Dkt. 107), or with respect only to Elections Commission Defendants (Dkt. 101). Plaintiffs' claim also provides a sound basis for injunctive relief. Plaintiffs have alleged irreparable harms of sufficient breadth and depth to justify an injunction. The Legislature's arguments to the contrary are built upon inapposite law and fallacious logic. Plaintiffs meet all remaining requirements. The Legislature's efforts to tip the equities in its favor fail legally and factually.

Given the procedural posture of this case—with all parties agreeing there are no factual disputes and extensive additional materials cited in connection with the Legislature's motion to dismiss—the Court should enter summary judgment. *See* Wis. Stat. § 802.06(2)(b). That will resolve the declaratory judgment portion of Plaintiffs' claim. Doing so will not prejudice any party and will facilitate an efficient, orderly appeal. If the Court adjudicates the declaratory judgment claim at this juncture, there is no need to rule on Plaintiffs' motion for a temporary injunction.

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[1] The Legislature is a proposed Defendant-Intervenor. (Dkt. 104.) Because the parties have stipulated to the Legislature's permissive intervention (*see* Dkt. 112), Plaintiffs anticipate an order effectuating the intervention and proceed as if the Legislature has been made a Defendant and its motion to dismiss is no longer provisional.

[2] This is the same document as Senate Joint Resolution 1, cited in Dkt. 86 at 17 and Dkt. 98 at 15-18, 21, 24.

ARGUMENT

I. ELECTIONS COMMISSION DEFENDANTS SHOULD NOT BE DISMISSED.

Plaintiffs brought this action against Elections Commission Defendants Dean Knudson, Jodi Jensen, Julie Glancey, Beverly Gill, Ann Jacobs, Mark Thomsen, and Meagan Wolfe to enjoin enforcement of laws adopted in the December 2018 Extraordinary Session. Elections Commission Defendants seek dismissal because Plaintiffs do not accuse them of wrongdoing. (*See* Dkt. 100 at 4.) But Elections Commission Defendants are "responsible for administering Wisconsin's elections laws." (*Id.* (citing Wis. Stat. § 5.05(1))); *accord* Wis. Stat. § 5.05(2w), (3d), (3g). It follows that they are subject to suit "against the enforcing officer to prevent him from doing that which it is claimed he has no legal right to do." *Berlowitz v. Roach*, 252 Wis. 61, 64, 30 N.W.2d 256 (1947).[3] Wis. Stat. § 5.05(5t) does not change this calculus. That provision makes "binding on the commission" published court decisions. This Court's decisions are not published. Thus, no remedial order this Court may issue would fall within the ambit of subsection (5t). Moreover, even if the provision applies, dismissal is not justified, because subsection (5t) allows the commission "2 months" to implement a court decision. Such a delay is inappropriate in a case, like this one, seeking immediate relief from irreparable harms that will be caused by enforcement of the laws at issue. Finally, the relief Plaintiffs request is not moot. Most elections-related provisions of Act 369 have not been enjoined. *See* Section V.B, *infra*. And the federal injunction remains under appeal, with reversal possible at any time. (*See* Dkt. 86 at 20 n.16.)

These arguments notwithstanding, in the interests of judicial economy, Plaintiffs have offered to stipulate to dismissal of Elections Commission Defendants, provided they agree to abide promptly by this Court's orders. Elections Commission Defendants have not yet responded.

[3] Elections Commission Defendants have express authority to participate "in any civil action or proceeding for the purpose of … ensuring the[] proper administration" of the election laws. Wis. Stat. § 5.05(9).

II. BECAUSE THE DECEMBER 2018 EXTRAORDINARY SESSION WAS UNCONSTITUTIONALLY CONVENED, THE LEGISLATURE'S MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM SHOULD BE DENIED.

Plaintiffs' legal theory is meritorious. Accordingly, the Legislature's motion to dismiss Plaintiffs' Amended Complaint for failure to state a claim should be denied.[4]

A. The Legislature Conflates Statutory Terms and Elides Material Distinctions in an Effort To Obscure the Absence of Legal Authority for the December 2018 Extraordinary Session.

The Constitution limits the Legislature to "meet[ing]" at a "time … provided by law." Wis. Const. art. IV, § 11. The only law on the topic addresses "regular sessions" and begins by stating that the Legislature "shall meet annually." Wis. Stat. § 13.02. It continues in four subsections:

- Subsection (1) directs when the Legislature "shall convene" to undertake prerequisites to "the conduct of its business."
- Subsection (2) decrees when the "regular session" (also the title of the entire statute) "shall commence" "each year."
- Subsection (3) instructs a legislative committee to "develop," "[e]arly in each biennial session period," "a work schedule."
- Subsection (4) provides that "measures introduced in the regular annual session of the odd-numbered year … carry over to the regular annual session held in the even-numbered year."

Nowhere does section 13.02 authorize, or even mention, an extraordinary session. Such a session is an unauthorized invention of the Legislature, not contained in or contemplated by the law.[5]

The absence of any authorization for an extraordinary session is itself dispositive. Without such legal authorization, the December 2018 Extraordinary Session was not held at a "time …

[4] The Legislature briefed two other arguments for dismissal: lack of standing under Wis. Stat. § 802.06(2)(a)2. and failure to join an indispensable party under Wis. Stat. § 802.06(2)(a)7. (*See* Dkt. 103 at 12-13.) But the Legislature failed to move for relief on either basis. (Dkt. 107 at 2.) The Legislature subsequently withdrew its joinder argument (Dkt. 112), and, because "standing in Wisconsin is not a matter of jurisdiction," *McConkey v. Van Hollen*, 2010 WI 57, ¶15, 326 Wis. 2d 1, 783 N.W.2d 855, the Legislature's arguments on standing are not a basis for dismissal under Wis. Stat. § 802.06(2)(a)2. Plaintiffs address the Legislature's motion to dismiss for failure to state a claim here and discuss the standing issues in the context of injunctive relief. *See* Section III.B, *infra*.

[5] The Legislature presumably could enact a statutory provision authorizing extraordinary sessions. Indeed, as noted in Governor Evers' brief, it has done so before. (Dkt. 98 at 19-20.)

provided by law," Wis. Const. art. IV, § 11, and therefore was convened outside the authority of the Wisconsin Constitution. (*See* Dkt. 86 at 8-20.) In attempting to rebut this conclusion, the Legislature's brief conflates distinct statutory terms and invents some of its own.

The Legislature's goal is to transform extraordinary sessions (which are *ultra vires*) into a component of regular sessions (which are provided by law). As part of this alchemical effort, the Legislature's brief repeatedly misstates the law. The Legislature's brief consistently references a "biennial session." (Dkt. 103 at 1, 3, 4, 5, 6, 7, 8, 14, 15, 16, 19, 21.) But there is no longer any such thing. The 1968 amendment to Article IV, Section 11 abolished it, and current statute mandates the Legislature "meet annually." Wis. Stat. § 13.02. For this reason, the Legislature does not, as it claims, "hold a single, continuous biennial session," "adjourning only when the next biennial session begins." (Dkt. 103 at 4, 16.)[6]

Section 13.02(3) uses the phrase "biennial session period," but not as a reference to the regular session. The biennial session period refers to the two-year term of office for the Assembly (and half the term of office for the Senate). The biennial session period contains two annual regular sessions, each of which "shall commence at 2 p.m. on the first Tuesday after the 8th day of January." Wis. Stat. § 13.02(2). Section 13.02(3) requires the Joint Committee on Legislative Organization to "develop a work schedule *for the legislative session*" occurring in "each year" of

[6] The Legislature's related statement that it "meets continuously through the biennial [session] period, pursuant to the joint resolution that it adopts at the start of the session" (Dkt. 103 at 18) is similarly incorrect. Wis. Stat. § 13.02(2) specifies the date and time at which the Legislature shall commence its first meeting of the regular session; in odd-numbered years, that is several days *after* the beginning of the biennial session period (as established in Wis. Stat. § 13.02(1)). Moreover, Wis. Stat. § 13.02(3)—the subsection the Legislature deems dispositive—provides that the Legislature shall hold "at least one meeting in January of each year." If the Legislature holds a singular meeting coextensive with the biennial session period, this phrase has no meaning. Such an interpretation is to be avoided. *See, e.g.*, *Estate of Miller v. Storey*, 2017 WI 99, ¶42 & n.19, 378 Wis. 2d 358, 903 N.W.2d 759 (citing *State ex rel. Kalal v. Cir. Ct. for Dane Cty.*, 2004 WI 58, ¶46, 271 Wis. 2d 633, 681 N.W.2d 110); Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 174 (2012)). Nor can this phrase be dismissed as a vestige that predates the current constitutional text, because subsection (3) "is the legislation implementing the 1968 amendment to Article IV, Section 11." (Dkt. 103 at 16.)

the period. Wis. Stat. § 13.02(3) (emphasis added). Reading section 13.02 as a whole, subsection (3)'s reference to "the legislative session" can only mean the regular session, distinct from the biennial session period. If, as the Legislature contends, "biennial session period" and "the legislative session" are synonymous—a necessary predicate for twisting subsection (3) into authority for one continuous biennial session—then the statute would not use two distinct terms. Equating the two terms also renders subsections (2) and (4) nonsensical.

Having inaccurately conflated the "biennial session period" and the regular session, the Legislature moves on to invent new terminology without foundation. It does so in service of its preferred definition of "extraordinary session" as any "non-prescheduled [legislative] floor period." (Dkt. 103 at 1, 4, 5, 6, 15, 16, 17, 18, 19, 20, 21.) The Legislature's brief appears to have invented this definition from whole cloth. Neither the Constitution nor Wis. Stat. § 13.02 mentions a "floor period," much less distinguishes whether one was prescheduled. The Legislature borrows the idea of floor period from work schedules adopted by joint resolution. As the Legislature's brief explains, since 1977 such work schedules have "set out prescheduled floor periods, prescheduled 'interim' non-floor periods, and other prescheduled legislative markers." (Dkt. 103 at 6.)[7]

There are two problems here. One is definitional, and the other addresses legal authority. As a definitional matter, extraordinary sessions differ in kind from, and therefore cannot be defined as components of, regular sessions. The truth of this is in their name, which includes the adjective

[7] Plaintiffs' interpretation is consistent with the text of the relevant work schedule, set out in 2017 Enrolled Joint Resolution 1. In that document, "[t]he legislature declares that the biennial session period of the 2017 Wisconsin legislature began on Tuesday, January 3, 2017, and that the biennial session period ends at noon on Monday, January 7, 2019." (Leg. App. 29, § 1 (1) (Dkt. 106 at 139).) Both dates reflect the application of Wis. Stat. § 13.02(1). In no way does this language apply Wis. Stat. § 13.02(2) or specify when the Legislature will meet in regular session. Similarly, 2017 Enrolled Joint Resolution 1 does not assert that the regular session extends to the end of the biennial session period; to the contrary, it acknowledges that "the *biennial term* of the 2017 legislature ends on Monday, January 7, 2019." (Leg. App. 29, § 1(6) (Dkt. 106 at 141) (emphasis added).)

"extraordinary," defined as "going beyond what is … regular[.]"[8] This is not mere semantics. The Legislature and its committees treat extraordinary sessions differently, because such sessions use different procedural rules and have specific, limited purposes. *See* Assembly Rule 93; Senate Rule 93.[9] The legislative journals of the respective houses address extraordinary sessions differently from the regular session. *Compare* Assembly Journal, 103rd Reg. Sess. at 833 (Wis. 2018) *with* Assembly Journal, Dec. 2018 Extraordinary Session at 893;[10] *also compare* Senate Journal, 103rd Reg. Session at 842 (Wis. 2018) *with* Senate Journal, Dec. 2018 Extraordinary Session at 978.[11] And analyses by the Legislative Reference Bureau and Legislative Council—the Legislature's own service agencies—differentiate extraordinary sessions, consistently comparing them to special sessions, and contrasting them with regular sessions. *See, e.g.*, Daniel F. Ritsche, *Special and Extraordinary Sessions of the Wisconsin Legislature*, LRB-IB-14-2 at 1 (2014).[12] The Legislature's efforts to characterize the December 2018 Extraordinary Session "as part of" the regular session (Dkt. 103 at 8) cannot overcome these differences. (*Accord* Dkt. 98 at 17-19.)

The other, larger problem with the Legislature's brief is its failure to acknowledge that Wis. Stat. § 13.02 does not authorize the Legislature to meet in anything other than regular session.

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[8] Merriam-Webster, *Extraordinary*, available at https://www.merriam-webster.com/dictionary/extraordinary.

[9] Available at https:/docs.legis.wisconsin.gov/2017/related/rules/assembly.pdf and https://docs.legis.wisconsin.gov/2017/related/rules/senate.pdf, respectively.

[10] Available at https://docs.legis.wisconsin.gov/2017/related/journals/assembly/20180222.pdf and https://-docs.legis.wisconsin.gov/2017/related/journals/assembly/20180322ex.pdf, respectively.

[11] Available at https://docs.legis.wisconsin.gov/2017/related/journals/senate/20180320.pdf and https://-docs.legis.wisconsin.gov/2017/related/journals/senate/20181204ede8.pdf, respectively.

[12] Available at http://legis.wisconsin.gov/eupdates/sen07/Special_and_extraordinary_sessions_of_the_Wisconsin_Legislature_Aug_2014.pdf. In this document, the LRB defines an extraordinary session as one that is "initiated by the legislature" "to consider one or more specified topics or pieces of legislation" and "differ[s] from regular sessions in [] purposes and procedures."

Because work schedules are adopted by joint resolution, they are not law.[13] It follows that "prescheduled floor periods" are merely a convenient tool the Legislature uses for its internal calendaring—and not a source of legal authority—for the Legislature to meet. Falling short of conveying authority for regular session meetings, the work schedule certainly cannot go one step further to confer legal authority for the Legislature "to call non-prescheduled floor periods during the biennial session [period]." (Dkt. 103 at 6.)

B. The Plain Text of Article IV, Section 11 and Wis. Stat. § 13.02 Establish that Plaintiffs Are Correct on the Merits.

1. Wis. Stat. § 13.02(2) sets the relevant parameters that reveal the December 2018 Extraordinary Session as unconstitutional.

In an effort to defend the December 2018 Extraordinary Session, the Legislature ignores the Constitution, distorts the statutes, and caricatures Plaintiffs' arguments. All to no avail. Despite the Legislature's efforts, no "simple path … defeats entirely Plaintiffs' lawsuit." (Dkt. 103 at 17.)

Plaintiffs and the Legislature agree that the key constitutional question here is whether, in December 2018, the Legislature was meeting at a time provided by law. (*see* id. at 14.) According to the Legislature, the answer is simple: "December 2018 falls within th[e biennial session] period. The Constitution's plain text requires no more." (*Id.* at 15.) But this argument ignores the text it invokes. The only meeting "provided by law," Wis. Const. art. IV, § 11, is the one that "commence[s]" the regular session in January of each year, Wis. Stat. § 13.02(2). Once commenced, the regular session proceeds along a chain that links one meeting to the next. The Legislature builds that chain each time adjourns; either the adjournment names a date-certain on which the Legislature will reconvene, *see, e.g.*, Assembly Journal, 103rd Reg. Sess. at 88 (Wis.

[13] The Legislature does not contest—and thereby concedes—Plaintiffs' argument (Dkt. 86 at 9-10) that Article IV, Section 11's use of "provided by law" references statutes and cannot be satisfied by a joint resolution.

2017); Senate Journal, 103rd Reg. Session at 10 (Wis. 2017),[14] or the adjournment references the next floor session in the Legislature's work schedule (authorized by Wis. Stat. § 13.02(3)).[15] Either way, the adjournment adds the next links to the chain. When the Legislature stops meeting, completes its last scheduled work period, or adjourns without providing a link to its next meeting, the chain is broken and the regular session ends. *See, e.g.*, Assembly Journal, 103rd Reg. Sess., at 908 (Wis. 2018) (adjourning the regular session on March 22, 2018) and Senate Journal, 103rd Reg. Sess., at 871 (Wis. 2018) (same);[16] Assembly Journal, 103rd Reg. Sess., at 917 (Wis. 2018) (adversely disposing of all bills not passed by both houses during the regular session) and Senate Journal, 103rd Reg. Sess., at 881 (Wis. 2018) (same).[17] At that point, the only way the Legislature can convene before the next date specified in Wis. Stat. § 13.02(2) is if the Governor calls a special session.

The Legislature argues in the alternative that the December 2018 Extraordinary Session is nothing more than "a non-prescheduled floor period" within the regular session. (*E.g.*, Dkt. 103 at 6.) This argument proceeds from the fallacious premise that the extraordinary session is, in fact, regular. As discussed above in Section II.A, extraordinary sessions differ in kind from regular sessions. That means they cannot be components of the regular session. Even if the December 2018 Extraordinary Session could be considered just another "part of" the regular session (Dkt.

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[14] Available at https://docs.legis.wisconsin.gov/2017/related/journals/assembly/20170307.pdf and https://-docs.legis.wisconsin.gov/2017/related/journals/senate/20170103.pdf, respectively.

[15] When the Assembly or Senate adjourns a meeting "pursuant to" the joint resolution containing the regular-session calendar, it indicates that house may convene during the next regular-session floor period. *See, e.g.*, Assembly Journal, 103rd Reg. Sess. at 11 (Wis. 2017), available at https://docs.legis.wisconsin.gov/2017/related/journals/assembly/20170103.pdf.

[16] Available at https://docs.legis.wisconsin.gov/2017/related/journals/assembly/20180322.pdf and https://-docs.legis.wisconsin.gov/2017/related/journals/senate/20180322.pdf, respectively.

[17] Available at https://docs.legis.wisconsin.gov/2017/related/journals/assembly/20180328.pdf and https://-docs.legis.wisconsin.gov/2017/related/journals/senate/20180328.pdf, respectively.

103 at 8), the Legislature had no authority to convene on December 3, 2018. Nothing in section 13.02(3) authorizes non-prescheduled floor periods. And the Legislature had adjourned its last scheduled floor session without establishing either a date certain for reconvening or adding another scheduled floor period to its work schedule. Assembly Journal, 103rd Reg. Sess. at 909 (Wis. 2018); Senate Journal, 103rd Reg. Sess. at 869 (Wis. 2018).[18] By adjourning indefinitely—which Governor Evers' brief characterizes as an adjournment *sine die* (Dkt. 98 at 20-22)—the Legislature broke the regular-session chain. As a result, when the Legislature convened the December 2018 Extraordinary Session, it was no longer meeting as "provided by law" under Wis. Stat. § 13.02 and was, consequently, acting outside the authority conferred by Article IV, Section 11.

Contrary to the Legislature's brief, none of this amounts to Plaintiffs arguing that the Legislature must "enact a specific law that authorizes it to gather" each time it convenes within the regular session. (Dkt. 103 at 1.) Nor does Plaintiffs' argument imply that, in the absence of enactments authorizing each individual meeting of the Legislature, "*all* laws … adopted since at least 1971 have been '*ultra vires*.'" (*Id.* at 18 (emphases in original).) These are absurd distortions of Plaintiffs' position. They ignore the fact that Wisconsin has a law—Wis. Stat. § 13.02—that authorizes the regular session and delegates to the Legislature the authority to schedule regular-session meetings. Neither regular sessions nor regular-session meetings require additional statutory authorization. However, as Plaintiffs have noted, the Legislature may be able to adopt, consistent with the Constitution, statutes that authorize extraordinary sessions.[19] Except as identified in Governor Evers' brief (Dkt. 98 at 19-20), the Legislature has not done so to date.

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[18] Available at https://docs.legis.wisconsin.gov/2017/related/journals/assembly/20180322.pdf and https://-docs.legis.wisconsin.gov/2017/related/journals/senate/20180322.pdf, respectively.

[19] If, as the Legislature argues, the purpose of the 1968 amendment to Article IV, Section 11 was to increase the Legislature's flexibility in scheduling its meetings (*see* Dkt. 103 at 16), that purpose can be vindicated through further statutory enactments. However, it bears mentioning that Article IV, Section 11 is not merely a "general framework" (*id.* at 3), but instead a constraint on legislative power (*see* Dkt. 86 at 13-20). Even after the 1968

2. Wis. Stat. § 13.02(3) is not dispositive—or favorable to the Legislature.

The Legislature's reliance on Wis. Stat. § 13.02(3) is misplaced. Subsection (3) instructs the Joint Committee on Legislative Organization to "meet and develop a work schedule" for the regular session, "to be submitted to the legislature as a joint resolution." It goes no further. Because subsection (3) does not authorize any meetings, it can neither satisfy Article IV, Section 11's "provided by law" requirement nor bear the weight the Legislature's brief places upon it as authorizing indefinite ad hoc extraordinary sessions. By the Legislature's logic, so long as the work schedule identifies the boundaries of the biennial session period, constitutional constraints do not apply to meetings of the Legislature occurring within those boundaries. Thus, the Legislature argues, its work schedule can, merely by referencing the hypothetical possibility of an extraordinary session, obviate the constitutional limitation that the Legislature meet only at times provided by law and evade the constitutional requirement that the Legislature conduct business only when a quorum is present. (Dkt. 103 at 18-20.) If the Legislature can use the work schedule as an end-run around these requirements, what prevents it from using that same joint resolution to circumvent additional constitutional limitations on the legislative process, including bicameralism and presentment?

Moreover, work schedules developed under Wis. Stat. § 13.02(3) apply only to the regular session. Even if they could authorize meetings (which they cannot), that authority would not reach an extraordinary session. This follows from the fact that section 13.02 as a whole addresses only regular sessions. The limited scope is apparent from the text of the statute—which never mentions, much less authorizes, extraordinary sessions—and is underscored by its title: "Regular sessions."

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amendment, the Legislature's flexibility is not unfettered, and the Legislature is wrong to assert that "nothing in the Constitution's text or history imposes any limitation on when the Legislature can choose to meet in a floor period." (Dkt. 103 at 1; *see also id.* at 19 & n.7.) Article IV, Section 11 is precisely such a limitation.

Wis. Stat. § 13.02. "The title of a statute cannot defeat the language of the law, but it is persuasive evidence of a statutory interpretation." *Mireles v. Labor & Indus. Review Comm'n*, 2000 WI 96, ¶60 n.13, 237 Wis. 2d 69, 613 N.W.2d 875 (citing *Pure Milk Prods. Coop. v. Nat'l Farmers Org.*, 64 Wis. 2d 241, 253, 219 N.W.2d 564 (1974)); *accord* Scalia & Garner, *supra*, at 221 ("Titles and headings are permissible indicators of meaning."). The absence of any reference to extraordinary sessions in section 13.02(3), underscored by the statutory title, rebuts the Legislature's argument that the subsection authorized the December 2018 Extraordinary Session.

C. Prior Use of Extraordinary Sessions Does Not Foreclose Plaintiffs' Argument.

The Legislature cites "uniform historical practice for decades" (Dkt. 103 at 19) to insist that Plaintiffs' argument must be wrong. This both overstates the history of extraordinary sessions and undermines the importance of constitutional constraints on government power. In any event, "[t]he historical practice of the political branches is, of course, irrelevant when the Constitution is clear." *NLRB v. Noel Canning*, 573 U.S. 513, 584 (2014) (Scalia, J., concurring in judgment).

1. The Legislature overstates both the breadth and the depth of the extraordinary session's importance to legislative work.

The Legislature paints the extraordinary session as "a critical" "long-standing" "common legislative mechanism," utilized "time and again," "that has proven essential in modern times." (Dkt. 105 at 1, 2, 18.) History does not bear this out. First and foremost, the State of Wisconsin survived for more than 130 years—from statehood until 1980—without the Legislature holding a single extraordinary session. Even in the relatively short time since the Legislature engineered the concept of extraordinary sessions, the Legislature has averaged significantly less than one such session annually. Several biennial session periods have passed, including as recently as 2013-2014, without an extraordinary session being convened.

Even when extraordinary sessions have been used, the results are not nearly as voluminous as the Legislature's brief suggests. Of the 330 bills and 9 resolutions passed during extraordinary sessions, 172—more than half of the total—are accounted for by only two of the 27 extraordinary sessions the Legislature lists. The vast majority of those extraordinary sessions—18 of them—yielded six or fewer enactments, and a full one-third (9 sessions) yielded only one or two. As discussed in Section III.E below, only a small percentage, at most, of the bills passed in other extraordinary sessions would be put at risk by a ruling for Plaintiffs here, and that risk can be mitigated—if not eliminated—by the Legislature readopting those enactments during a session validly convened. It is therefore difficult to see how Plaintiffs' theory threatens to be "crippling to [the Legislature's] ability to serve the needs of Wisconsin citizens." (Dkt. 105 at 15.)

2. There is no adverse possession that trumps constitutional constraints on government power.

Regardless, unconstitutional practices are not saved by sheer repetition. Both the State and federal supreme courts have definitively rejected arguments that, because a practice has been in place for years, it must be constitutional. Recently, for example, the Wisconsin Supreme Court held in *Tetra Tech EC, Inc. v. Wisconsin Department of Revenue*, 2018 WI 75, 382 Wis. 2d 496, 914 N.W.2d 21, that the practice of judicial deference to agency interpretations of law is improper. Having roots that trace back nearly 150 years, *see id.*, ¶18 (citing *Harrington v. Smith*, 28 Wis. 43, 59-70 (1871)), did not protect such deference from judicial scrutiny and ultimately rejection.

And in a decision analogous to the circumstances here, the U.S. Supreme Court held the legislative veto unconstitutional in *INS v. Chadha*, 462 U.S. 919 (1983). In an effort to preserve the challenged practice, Congress emphasized that it had passed (and Presidents had signed) legislative veto provisions for more than 50 years, resulting in approximately 300 federal statutory provisions including that procedural mechanism. *See id.* at 944-45. The Court was unimpressed,

observing that the judicial "inquiry is sharpened rather than blunted" by the "frequency" with which the challenged practice was being used. *Id.* at 944. Nor was the Court moved by arguments about the legislative veto's utility: "the fact that a given law or procedure is efficient, convenient, and useful in facilitating functions of government, standing alone, will not save it if it is contrary to the Constitution. Convenience and efficiency are not the primary objectives—or the hallmarks—of democratic government." *Id.* "[E]ven useful 'political inventions' are subject to the demands of the Constitution which defines powers." *Id.* at 945.

Tetra Tech and *Chadha* are only examples. It is not rare for the judiciary to consider a new constitutional argument, even one implicating long-standing provisions. Such cases not infrequently result in displacement of long-held understandings and practices. As Justice Scalia explained in his *Noel Canning* concurrence, there is no "adverse-possession theory" of constitutional law whereby, because one political branch has "long claimed the powers in question" and the other "has not disputed those claims with sufficient vigor," the judiciary "should not upset the compromises and working arrangements that the elected branches of Government themselves have reached." 573 U.S. at 570 (internal quotation marks omitted). Yet the Legislature advocates precisely such a theory here, urging this Court to reject the plain meaning of Article IV, Section 11 and Wis. Stat. § 13.02 because extraordinary sessions have been [sporadically] held for less than one-fourth of Wisconsin's history as a state. Such an approach undermines the Constitution and is contrary to Wisconsin law. *See, e.g.*, *Bd. of Trustees of Lawrence Univ. v. Outagamie Cty.*, 150 Wis. 244, 253, 136 N.W. 619 (1912) ("Acquiescence for no length of time can legalize a clear usurpation of power, where the people have plainly expressed their will in the constitution, and appointed judicial tribunals to enforce it." (internal quotation marks omitted)).

D. If the Legislature Is In Continuous Session, Article IV, Section 11 Is Rendered Superfluous.

The Legislature argues that it has used joint resolutions to adopt work schedules that render the regular session coextensive with the biennial session period, notwithstanding statutory text that provides otherwise. This argument reads Article IV, Section 11's constraints out of the Constitution. It therefore cannot be credited. *See, e.g.*, *Noel Canning*, 573 U.S. at 556 (disqualifying a proposed constitutional interpretation that "would basically read [a Clause] out of the Constitution"); *Furman v. Georgia*, 408 U.S. 238, 265 (1972) (Brennan, J., concurring) (explaining rejection of a theory because, under that reading, "the Clause would have been effectively read out of the Bill of Rights"); *Rogers-Ruger Co. v. Murray*, 115 Wis. 267, 271, 91 N.W. 657 (1902) ("Words should not be read into or read out of a plain statute. To adopt the construction asked would be to make a new statute. This we cannot do.").

As explained in Plaintiffs' opening brief, the framers viewed excessive or capricious legislating as a significant threat to liberty. (*See* Dkt. 86 at 13-14.)[20] For that reason, they included Article IV, Section 11 in the Constitution as an express limitation on when the Legislature could convene to conduct legislative business (*see id*. at 13-15.) The 1968 amendment retained the

[20] Publications contemporaneous to the constitutional conventions provide additional support. *See, e.g.*, *Views of 'K'—No. 2*, Madison Express (Mar. 26, 1846), reprinted in *The Movement for Statehood 1845-1846* (Milo M. Quaife, ed., 1918) at 146, 148 ("It is a remark full of truth that the tyranny of legislation is one of the most formidable evils, and fraught with the greatest inconveniences and most disastrous consequences to which a free people can be subjected. … A power liable to such abuse should, by the constitution, be taken from the legislature."); *Biennial Sessions*, Racine Advocate (June 30, 1846), reprinted in *The Movement for Statehood 1845-1846* at 283 ("Throughout the United States there is at the present moment a strong disposition to reduce all legislative proceedings to a greater simplicity than has obtained for many years past. … [A]lthough the action of the legislature may hasten the advent of some extensive system of improvements, it can very rarely do any good, and must almost always lead to the ruinous consequences we have seen in Michigan, in Illinois, and elsewhere."); *Organization of the Legislature*, Wisconsin Argus (Dec. 8, 1846), reprinted in *The Struggle Over Ratification 1846-1847* (Milo M. Quaife, ed., 1920) at 159 ("[O]ver legislation is worse than nothing."); *Restrictions on the Legislature*, Racine Advocate (Dec. 2, 1846), reprinted in *The Struggle Over Ratification 1846-1847* at 213-14 ("We should like to know what a convention was called for if not to place restrictions on the executive, the judiciary, and the legislature. The very definition of the powers of each is a restriction from other powers, and if we are to have no restrictions, of course we can have no constitution. … It has long been confessed by all in this country that law making has become too much a passion with our legislatures, and that restrictions upon them are necessary.").

restriction that the Legislature "shall meet" only "at such time as shall be provided by law." Wis. Const. art. IV, § 11. The Legislature's brief argues that, "in the immediate wake of the 1968 amendment," the Legislature created a loophole by which it has "used the flexibility afforded under the 1968 amendment to remain in continuous session throughout the biennial period, adjourning only when the next biennial session begins." (Dkt. 103 at 5, 10.) But that cannot be right. To read the Legislature's practice to date as having accomplished this—notwithstanding contrary language in Wis. Stat. § 13.02 and the biennial work schedules—would contravene constitutional and statutory text, as argued above, and undermine the very purpose of Article IV, Section 11. In practice, the Legislature's approach would render the restrictions of Article IV, Section 11 a dead letter. *See, e.g.*, *Foster v. City of Kenosha*, 12 Wis. 616, 620 (1860) (affirming injunction against enforcement of amendment to city charter on grounds that it would render a "provision of the constitution … a dead letter, entirely inoperative and of no effect"). While the 1968 amendment to Article IV, Section 11 granted the Legislature some flexibility, it does not allow the Legislature to convene absent legal authority.

E. Historical Context Bolsters Plaintiffs' Plain-Text Interpretation.

The Legislature argues that historical materials "further undermine" Plaintiffs' stance. (Dkt. 103 at 20.) Not so. As discussed in Plaintiffs' earlier brief and again above (and not contested at all by the Legislature), the original adoption of Article IV, Section 11 embodied the then-current "distrust" of legislative authority. (Dkt. 86 at 14 & n.8 (quoting Ray A. Brown, *The Making of the Wisconsin Constitution* (pt. 1), 1949 Wis. L. Rev. 648, 655 (1949)). The fundamental purpose of Article IV, Section 11 as a constraint on legislative power is crucial to any understanding of the provision and its application. The 1968 amendment did not strip Article IV, Section 11 from the Constitution. Had the Legislature wished to strip the provision entirely and seek unfettered flexibility, it could have proposed an amendment that did so. Instead, the Legislature proposed

(and the people approved) an amendment maintaining the requirement that the Legislature meet only "at such time as shall be provided by law." Wis. Const. art. IV, § 11. The contemporaneous materials that the Legislature cites do anticipate the Legislature meeting in multiple "work periods," but they do not suggest that anyone at the time accepted the Legislature's current view that, in the background behind those scheduled "work periods," the Legislature would "hold a single, continuous biennial session" (Dkt. 103 at 16) or otherwise convene non-prescheduled floorperiods. To the contrary, "[a]dvocates of this amendment claim[ed] it would permit the Legislature to establish, by law, a precise schedule around which each legislative session can be planned." Selma Parker, *Constitutional Amendments to be Submitted to the Wisconsin Electorate*, LRB-WB-68-1, at 9 (1968).[21] Yet the Legislature seizes upon the 1968 amendment to justify its atextual insistence that it meets in perpetual session with no "precise schedule" at all.

F. The Legislature's Argument Contravenes Practice and Precedent in Every Other State.

Contrary to the Legislature's argument, comparison with other states does not provide support for the December 2018 Extraordinary Session. The fact that the National Conference of State Legislatures does not record a definite adjournment date for Wisconsin's Legislature in 2018 does not ratify the argument that the Legislature operates in continuous session. Far more illuminating is the recently filed amicus brief by state constitutional scholars, which demonstrates that the Legislature's position would set Wisconsin apart as the only state where a legislative committee can self-convene the legislature by internal rule. (*See* Scholars' Amicus at 14.)[22] That comparative analysis is probative. *See, e.g.*, *State v. Cole*, 2003 WI 112, ¶39, 264 Wis. 2d 520,

[21] The LRB analysis is consistent with the materials provided to voters in the run up to the referendum on the 1968 amendment to Article IV, Section 11. (*See* Scholars' Amicus at 8-9 & n.7.)

[22] Plaintiffs are agnostic about the scholars' argument that the Legislature cannot provide for extraordinary sessions by statute. That question need not be decided here to determine the propriety of the December 2018 Extraordinary Session, which was convened in the absence of any statutory authority.

665 N.W.2d 328 (Wisconsin courts take into account "the practices and interpretations of other states" in analyzing questions of first impression); *State v. Chvala*, 2003 WI App 257, ¶23, 268 Wis. 2d 451, 673 N.W.2d 401 (Wisconsin courts "consider how courts of other jurisdictions have decided the same or similar issues" as an aid to interpreting the Wisconsin Constitution). And the fact that legislatures and courts in other states have uniformly rejected arguments for "the sort of extraordinary convening power" claimed by the Legislature here (Scholars' Amicus at 14-15) underscores the weaknesses in the arguments pressed by the Legislature.

III. PLAINTIFFS SATISFY ALL REQUIREMENTS FOR INJUNCTIVE RELIEF.

To obtain an injunction, a movant must make four showings: (1) a reasonable probability of ultimate success on the merits, (2) that the movant would suffer irreparable harm in the absence of an injunction, (3) that an injunction is necessary to preserve the status quo, and (4) that the movant has no other adequate remedy at law. *Werner v. A.L. Grootemaat & Sons, Inc.*, 80 Wis. 2d 513, 520-21, 259 N.W.2d 310 (1977). Plaintiffs satisfy all four requirements.

A. As Demonstrated Above, Plaintiffs' Position Is Correct on the Merits.

For the reasons articulated in prior briefing and above, Plaintiffs' claim is meritorious. All Defendants, including the Legislature in its capacity as Defendant-Intervenor, have had the opportunity to evaluate Plaintiffs' arguments and present their views to the Court. Defendant Governor Evers "determined that Plaintiffs are likely to succeed on the merits of their claim" and "joins the Plaintiffs' brief." (Dkt. 98 at 2.) Elections Commission Defendants are agnostic on the merits. (Dkt. 100 at 5.) The Legislature disputes Plaintiffs' arguments and has responded at length. (Dkt. 103 at 1-21.) In Section II above, Plaintiffs rebut the Legislature's position. A dozen scholars who specialize in state constitutional law have also considered the arguments and expressed their strong support for Plaintiffs' view. (*See* Scholars' Amicus.) In light of these materials, Plaintiffs have more than "a reasonable probability of ultimate success on the merits." *Werner*, 80 Wis. 2d

at 520. Indeed, now that the arguments have been fully briefed, the legal rectitude of Plaintiffs' position is clear.

B. Plaintiffs' Allegations of Irreparable Harms Justify Injunctive Relief.

Plaintiffs have alleged irreparable harms, both ongoing and imminent. (*See* Dkt. 86 at 20-38.) Those harms justify injunctive relief. The Legislature does not contest the factual basis of Plaintiffs' harms. Instead, it argues those harms legally insufficient, both for standing and as a predicate for injunctive relief. (Dkt. 103 at 21-26, 29-36.) The Legislature is wrong on both counts.

As a threshold matter, the Legislature's standing arguments rely on inapposite law. The Legislature cites repeatedly to federal cases, though Wisconsin standing law differs markedly. *See, e.g.*, *McConkey*, 2010 WI 57, ¶15 ("standing in Wisconsin is not a matter of jurisdiction, but of sound judicial policy"). Even where the Legislature focuses on Wisconsin standing principles, it fails to cite current law. The Legislature relies heavily on *State ex rel. First National Bank of Wisconsin Rapids v. M & I Peoples Bank of Coloma*, 95 Wis. 2d 303, 290 N.W.2d 321 (1980), though the test in that case was subsumed by *Foley-Ciccantelli v. Bishop's Grove Condominium Ass'n, Inc.*, 2011 WI 36, ¶40, 333 Wis. 2d 402, 797 N.W.2d 789 (lead op.); *id.*, ¶¶138, 149 & n.6 (Roggensack, J., concurring). Plaintiffs satisfy all three prongs of the *Foley-Ciccantelli* test.

Raising another red herring, the Legislature faults Plaintiffs for not "mak[ing] any arguments explaining how" Article IV, Sections 7 and 11 grant them "'a right to judicial relief.'" (Dkt. 103 at 26 (quoting *State ex rel. First Nat'l Bank* , 95 Wis. 2d at 307-08).) This is far from the first case to challenge "the constitutionality of the process in which [] legislation was enacted." *Davis v. Grover*, 166 Wis. 2d 501, 520, 480 N.W.2d 460 (1992). Wisconsin courts have decided numerous such cases. As in *McConkey v. Van Hollen*, the questions raised here should be decided, both because Plaintiffs have exceeded Wisconsin's low threshold for asserting a sufficient injury and "as a matter of judicial policy." 2010 WI 57, ¶¶15, 17. The *McConkey* court identified six

factors that supported adjudication. *See id.*, ¶18. All six apply here. Of particular note is the second factor, that, even if Plaintiffs' "claim were dismissed on standing grounds, another person who could more clearly demonstrate standing would bring an identical suit, raising judicial efficiency concerns." *Id.* Here that is no longer hypothetical, as it was in *McConkey*. Governor Evers has filed a cross claim in which he adopts Plaintiffs' theory, "joins Plaintiffs' cause of action," and requests the same relief Plaintiffs seek. (Dkt. 114 at 41.) Rejecting Plaintiffs' standing would, therefore, simply extend the process of adjudicating the same claim.

The Legislature's arguments against Plaintiffs' standing reveal a misunderstanding. The Legislature inaccurately perceives Plaintiffs as attacking the substance of laws adopted at the December 2018 Extraordinary Session. (Dkt. 103 at 22 ("Plaintiffs ask this Court to strike down the dozens of provisions that the Legislature enacted in December 2018").) Plaintiffs' challenge, however, is the *procedural defect* that taints the December 2018 Extraordinary Session. Plaintiffs ask this Court to hold these laws unenforceable because they were passed in contravention of constitutionally mandated procedures. *See, e.g.*, *State ex rel. LaFollette v. Stitt*, 114 Wis. 2d 358, 368-69, 338 N.W.2d 684 (1983) (legislative actions that violate the Constitution must be invalidated). As demonstrated below, Plaintiffs have alleged sufficient harms to pursue their claim and to obtain injunctive relief.

1. Plaintiffs allege harms sufficient to justify broad injunctive relief.

The Legislature argues that Plaintiffs cannot prevail because they have not alleged harm resulting from each provision of every Act and each appointment they seek to enjoin. (Dkt. 103 at 22-23.) This argument misses the mark. Because Plaintiffs are attacking a procedural defect inherent in the December 2018 Extraordinary Session, it follows that Plaintiffs need to allege only that they were harmed by that procedural infirmity—that is, that *any one* consequence of the December 2018 Extraordinary Session causes them injury—rather than more broadly demonstrate

injuries stemming from every provision adopted during that session. This distinction is crucial, and it renders inapposite the two federal cases that the Legislature cites for the principle that "standing is not dispensed in gross." (Dkt. 103 at 22.)

In *Lewis v. Casey*, 518 U.S. 343 (1996), prisoners sought injunctive relief on behalf of a class including every person imprisoned by the State of Arizona, then or in the future. The district court granted the injunction, based on evidence that two prisoners, not similarly situated to the entire class, had suffered harm. *See id.* at 356. The Supreme Court reversed, because the injunction swept far more broadly (in terms of people protected) than necessitated by plaintiffs' theory of the case. *See id.* at 358-60. Here, by contrast, all Plaintiffs share a single theory—that the December 2018 Extraordinary Session was unconstitutionally convened—and seek relief congruent with that theory. If, as Plaintiffs contend, the Legislature lacked authority to convene the December 2018 Extraordinary Session, actions taken at that session are unenforceable. *See, e.g.*, *State ex rel. Martin v. Zimmerman*, 233 Wis. 16, 21, 288 N.W. 454 (1939) (an act that is enacted in violation of the Constitution's procedural requirements "is no law"); *State v. Marcus*, 160 Wis. 354, 362 (1915) (when the Legislature acts "outside the constitution, [it] is without jurisdiction and its actions null").

The Legislature's other case, *Town of Chester v. Laroe Estates, Inc.*, 137 S. Ct. 1645 (2017), fares no better. There, the Supreme Court held that an intervenor must allege its own basis for standing to seek relief beyond what the initial parties requested. *See id.* at 1651. In reaching this conclusion, the Court explained that "a plaintiff must demonstrate standing for each claim he seeks to press and for each form of relief that is sought." *Id.* (quoting *Davis v. Fed. Election Comm'n*, 554 U.S. 724, 734 (2008)). Plaintiffs here meet that standard. As demonstrated below in Section III.B.2, Plaintiffs have alleged harms sufficient to establish standing under Wisconsin law

for their claim that the December 2018 Extraordinary Session was procedurally improper and for both the declaration and the injunction against enforcement they have requested.

The Wisconsin Supreme Court has explained that "a distinction exists between assessing the constitutionality of the substance of legislation and assessing the constitutionality of the process in which the legislation was enacted." *Davis*, 166 Wis. 2d at 520. The Legislature's suggestion that a challenge to the constitutionality of legislative procedure seeks "to prevent an act which merely infringes upon an abstract or theoretical right" is inaccurate. (Dkt. 103 at 23 (quoting *Bright v. City of Superior*, 163 Wis. 1, 18, 156 N.W. 600 (1916)).)[23] That is why Wisconsin courts have consistently held *constitutional* challenges to legislative procedure justiciable. *McDonald v. State*, 80 Wis. 407, 412, 50 N.W. 185 (1891); *Outagamie Cty. v. Smith*, 38 Wis. 2d 24, 40, 155 N.W.2d 639 (1968); *Stitt*, 114 Wis. 2d at 365; *State ex rel. Ozanne v. Fitzgerald*, 2011 WI 43, ¶51, 334 Wis. 2d 70, 798 N.W.2d 436 (Prosser, J., concurring).[24] Because Plaintiffs allege the December 2018 Extraordinary Session was convened unconstitutionally, detailed articulations of "claims of harm from … the laws that the Legislature enacted" in that session cannot be derided as "legally insufficient" "boilerplate." (Dkt. 103 at 23.)

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[23] *Bright* is inapposite. First, it involved a situation where the plaintiffs suffered no harm (and arguably received a benefit) from the enactment they sought to challenge; it was the absence of harm—not the procedural nature of their theory—that rendered the infringement "abstract" and caused the court to decline relief. Second, in contrast to this case, the procedural complaint in *Bright* was based on a statutory requirement, not a constitutional constraint. It is also notable how rarely *Bright* has been cited in the century since it was decided.

[24] The Legislature's brief cites these same cases as holding that "courts have *no* jurisdiction to interfere with the Legislature's rules and proceedings" because such procedures are "committed *entirely* to that body's discretion." (Dkt. 103 at 5, 21 (emphases added).) This is inaccurate, for the reasons explained in Plaintiffs' prior brief. (*See* Dkt. 86 at 11-13.) The Legislature cites one additional case, not addressed in Plaintiffs' earlier brief. That decision follows the pattern Plaintiffs identified, leaving legislative process to the Legislature with the caveat that such processes remain, "subject … o the provisions of the constitution," and affirming that courts may "consider whether the power of the legislature has been constitutionally exercised." *Goodland v. Zimmerman*, 243 Wis. 459, 468-69, 10 N.W.2d 180 (1943). To the extent that the Legislature wishes to rely—contrary to the above-cited settled law but in keeping with the analysis it publicly released upon Plaintiffs filing this suit—on the rules and proceedings clause, Wis. Const. art. IV, § 8, that issue goes to the merits of Plaintiffs' argument, not to whether Plaintiffs have alleged harms.

2. Plaintiffs' harms are concrete, substantial, and legally significant.

The Legislature also attacks a few specific harms that Plaintiffs have alleged. (Dkt. 103 at 23-26.) But those attacks land, at most, glancing blows, and in no way impair Plaintiffs' claim.

First and most importantly, the same misunderstanding addressed in the previous subsection derails the Legislature's discussion of taxpayer harms. The Legislature argues that "Plaintiffs purport to establish taxpayer standing in bulk, but it is their burden to allege harm from every provision that they challenge." (Dkt. 103 at 26 (internal citation omitted).) This is just as inaccurate with respect to taxpayer harms as it is applied to this case as a whole. Plaintiffs have alleged (as just one example of taxpayer harms) that agency efforts to retrofit existing guidance documents to meet the new requirements set forth in Section 38 of Act 369 will impose extensive costs on the public. (*See* Dkt. 86 at 32-33 (citing Dkt. 93 (Cain Aff.), ¶¶5, 8-12; Dkt. 94 (Greene Aff.), ¶6).) Governor Evers has also filed affidavits addressing compliance costs for a sampling of State agencies. (*See* Dkt. 99 at 5 (Nilsestuen Aff. ¶13), 15-16 (Richard Aff. ¶¶3-7), 22 (Karaskiewicz Aff. ¶¶4-6), 26 (Rowe Aff. ¶¶10-11), 30 (Koplien Aff. ¶¶3-7).) The Legislature admits that a "pecuniary harm need not be large" to establish taxpayer standing. (Dkt. 103 at 26.) But it does not engage with the fact that these costs are real and already being borne by the State. Absent the unlawful convening of the December 2018 Extraordinary Session, State agencies would not need to revisit all of their existing guidance documents and taxpayers would not be bearing this cost. Thus, Plaintiffs have properly alleged that an unlawful action—the December 2018 Extraordinary Session—has imposed pecuniary harm. There is no requirement that, simply because that unlawful act spawned a passel of new statutory provisions, Plaintiffs cannot bring a challenge without alleging harm from every single provision. That would be a perverse rule indeed.

With respect to specific harms, the Legislature's arguments are off-target. The Legislature questions how Plaintiffs can be harmed by the codification in statutes of existing administrative

regulations. (*Id.* at 24-25.) As explained in the affidavit filed by Kristin M. Kerschensteiner on behalf of Plaintiff Disability Rights Wisconsin, because "[c]ementing the terms of a [regulation] in statute impedes DRW from pursuing and achieving informal, cost-effective administrative modifications benefiting" its constituents, "the inflexibility created by codification" imposes harm "by requiring DRW to divert resources from its proactive efforts to assist people with disabilities, and instead force it to devote more if its limited time and financial resources to investigating and addressing unintended issues … that arise during the implementation and enforcement" of the now-codified rules. (Dkt. 91, ¶11.) These same concerns about policy ossification and a decreased ability to cooperate with agencies on implementing the law in ways that avoid perverse outcomes apply not only to DRW's work on behalf of people with disabilities, but also to the work done by Plaintiffs League of Women Voters, Black Leaders Organizing for Communities, and DRW to ensure that all Wisconsinites are able to exercise the right to vote.

Nor does the Legislature succeed in dismissing Plaintiffs' concerns about a new requirement (imposed by Section 10 of Act 370) that the Department of Health Services obtain legislative approval before seeking federal waivers. The Legislature insists it is pure speculation whether "the Department will seek federal approval to waive any federal law or propose any changes to Wisconsin's Medical Assistance plan," as well as "what the content of that approval/amendments [*sic*] would be, and whether those would harm any of Plaintiffs in any way." (Dkt. 103 at 25.) But the allegation is not harm caused by federally approved modifications; it is, rather, harm created by adding another roadblock to the process of seeking such modifications. DRW has always needed to work with DHS and then the federal government to document the existence of a problem, identify a solution, and advocate for its approval by State and federal regulators. Now, Section 10 adds another significant stumbling block—the need to obtain approval

from the Legislature before DHS can submit a proposal to the federal government. This harms DRW and those it is statutorily mandated to protect, both by diverting DRW's resources from other necessary work to an additional step in the advocacy process and by diminishing the likelihood that meritorious proposals will be made to the federal government in a timely manner, if at all.

The Legislature's remaining example is the new statutory prohibition on judicial deference to agency legal interpretations. (*Id.*) The Legislature asserts that this addition "merely codified the Wisconsin Supreme Court's decision in *Tetra Tech*, meaning that [it] impose[s] no possible injury." (*Id.* (internal citation omitted).) That is overly facile. As with the statutory codification of agency regulations, cementing this rule in statute constricts opportunities for Plaintiffs, agencies, the new Attorney General, and others to advocate for reconsideration of, changes to, or exceptions from this new judicial ruling. Such opportunities are particularly important where, as here, the Supreme Court lacks consensus on the rationale for the new rule and has offered minimal guidance on what it means or how it should be applied. *See Tetra Tech*, 2018 WI 75 (featuring four divergent opinions, none with full support of more than two justices).

There is, in sum, no basis for the Legislature's argument that Plaintiffs have failed to allege sufficient harms to justify injunctive relief.

C. Injunctive Relief Would Restore the Status Quo, and Plaintiffs Have No Adequate Remedy at Law.

The Legislature does not argue that Plaintiffs have an adequate alternate remedy to injunctive relief. Nor does the Legislature argue that Plaintiffs could restore the status quo prior to the December 2018 Extraordinary Session in the absence of an injunction. These elements are, therefore, conceded. The Legislature's argument that attempting to restore the status quo is itself impermissible in this instance is addressed in the next section.

D. The Legislature's Hypothetical and Hyperbolic Parade of Horribles Is Purely Speculative and Cannot Overcome Plaintiffs' Entitlement to Relief.

The Legislature catastrophizes that "granting any temporary injunction" in this case "would throw the laws of Wisconsin into chaos" and that "it is hard to overstate the disruption and uncertainty that would ensu[]e" from "unleash[ing] this rolling disaster upon the State." (Dkt. 103 at 36-37.) This is speculative fear-mongering, lacking a basis in fact. Plaintiffs' claim involves the December 2018 Extraordinary Session and the actions taken therein. That is all. Plaintiffs have not attacked other laws adopted through extraordinary sessions, and Plaintiffs are not aware of parties champing at the bit to do so. The tsunami of legal challenges that the Legislature predicts "will immediately" crash down on the courts (*id.* at 37) is speculation masquerading as argument. In any event, laws adopted through an unconstitutional procedure cannot be enforced, "regardless of the consequences. All the mischiefs that flow from unconstitutional enactments lie at the doors of those who are charged with the duty to make laws." *Milwaukee Cty. v. Isenring*, 109 Wis. 9, 29, 85 N.W. 131 (1901).

To the extent that a ruling in Plaintiffs' favor could highlight a potential vulnerability in other laws, the consequences are not dire as the Legislature asserts. Many—if not most—laws passed through extraordinary sessions are not subject to attack because they ratified contracts now lapsed, appropriated funds now fully spent, created statutory provisions subsequently ratified, promulgated legislative districts since redrawn, etc. With respect to those measures that might still invite attack, courts will have several options to limit the applicability of a ruling against the December 2018 Extraordinary Session, including but not limited to rejecting retroactivity of the ruling here, importing a reasonable limitations period, and applying laches, estoppel, reliance, or other equitable principles to mitigate the repercussions.

More fundamentally, however, the prospect of additional lawsuits is insufficient to outweigh Plaintiffs' entitlement to injunctive relief. *See, e.g.*, *Isenring*, 109 Wis. at 29. The cases the Legislature's brief cites demonstrate this. First, the case the Legislature uses to include a balancing of the equities among the factors relevant to an injunction—a factor generally absent from the Supreme Court's articulations of the standard in the forty years since—warns that an injunction that is "too narrow … contributes to evasion." *Pure Milk Prod. Coop. v. Nat'l Farmers Org.*, 90 Wis. 2d 781, 803, 280 N.W.2d 691 (1979). Then the case the Legislature uses to emphasize the importance of considering public policy as a relevant factor is one where the appellate court held, as a matter of law, that where the plaintiff had met its burden "the only reasonable conclusion would be to issue an injunction." *Sunnyside Feed Co. v. City of Portage*, 222 Wis. 2d 461, 474, 588 N.W.2d 278 (Ct. App. 1998). For that reason, the appellate court held the trial court had erroneously exercised its discretion in failing to grant injunctive relief. *See id.* The lesson is clear: where a party demonstrates entitlement to injunctive relief, the court should grant such relief, ensuring the injunction is sufficiently broad to redress the wrong at issue. Here, that lesson requires the injunction Plaintiffs seek.

IV. THE COURT SHOULD RENDER FINAL JUDGMENT AT THIS POINT.

The Court now has everything it needs to render final judgment, and it should proceed to do so. The incorporation of materials outside the Complaint has transformed the Legislature's motion to dismiss into one for summary judgment. The Legislature submitted a plethora of exhibits. (Dkt. 106.) Additionally, Plaintiffs, the Legislature, and the Governor cite to and/or rely extensively on affidavits submitted by Plaintiffs (Dkt. 89-95) and the Governor (Dkt. 99). When matters outside the pleadings are presented to the court, a motion to dismiss becomes one for summary judgment. Wis. Stat. § 802.06(2)(b); *see also, e.g.*, *Bammert v. Don's Super Valu, Inc.*, 2002 WI 85, ¶7 n.2, 254 Wis. 2d 347, 646 N.W.2d 365; *Bowen v. Am. Family Ins. Co.*, 2012 WI

App 29, ¶7, 340 Wis. 2d 232, 811 N.W.2d 887. Summary judgment may be awarded to the non-moving party where, as here, that party is entitled to judgment. Wis. Stat. § 802.08(6).

A summary judgment ruling will not prejudice any party. At the scheduling conference, all parties, including the Legislature, expressly agreed that that no facts are in dispute and no evidentiary hearing is necessary. (Dkt. 115 at 46:15-47:16.) And all parties wishing to do so have fully briefed the merits of Plaintiffs' constitutional challenge. (Elections Commission Defendants have chosen "not [to] take a position on" the merits of Plaintiffs' claim. (*See* Dkt. 100 at 5.)) Accordingly, it is proper for this Court to rule on summary judgment, resolving Plaintiffs' declaratory judgment claim.

If the Court adjudicates the declaratory judgment claim at this juncture, that will obviate the need to rule on Plaintiff's Motion for Temporary Injunction (Dkt. 32). Plaintiffs sought a temporary injunction as stop-gap protection while the declaratory judgment claim was litigated. An adjudication of the declaratory judgment claim renders the temporary injunction motion moot.

If, however, the Court declines to adjudicate the declaratory judgment claim at this juncture, it should grant the temporary injunction motions, as Plaintiffs have demonstrated (and will again at the hearing on this matter) that they will prevail on the merits of their challenge, that they have suffered or will imminently suffer irreparable harms, that they have no adequate remedy at law, and that the Legislature's alleged hardships resulting from an injunction are speculative and overblown.

V. THE COURT SHOULD REJECT FURTHER DELAY BUT SHOULD TAILOR ITS ORDER IN LIGHT OF THE APRIL 2 NONPARTISAN ELECTION.

A. The Legislature's Requests for a Stay and Further Briefing Should Be Denied.

Plaintiffs filed this lawsuit eight weeks ago and their motion for a temporary injunction less than a week later. The Legislature—despite not being named a party—promptly hired counsel.

WisPolitics.com, *GOP Lawmakers Paying Attorney in Lame-Duck Suits at Almost Twice the Rate Evers Paying* (Feb. 8, 2019) (linking to engagement letters).[25] It sought and received leave to file and fully brief a motion to dismiss, in addition to its response to Plaintiffs' temporary injunction motion. Accordingly, the Legislature has already filed more than 80 pages of pleadings and briefs in this action, many of which detail the harms it alleges will follow from a ruling in Plaintiffs' favor. Yet the Legislature now seeks not only an immediate stay of any injunctive relief, but also *still more briefing*, even though it has had ample opportunity to address the relevant arguments. The Court should deny both requests.

In *State v. Gudenschwager*, the Court held that a party seeking a stay pending appeal must show: (1) that it has a strong likelihood of merits success on appeal; (2) that it will suffer imminent irreparable injury in the absence of a stay; (3) that the stay will cause no substantial harm to other interested parties; *and* (4) that a stay will not harm the public interest. 191 Wis. 2d 431, 440, 529 N.W.2d 225 (1995) (per curiam). The Legislature fails to meet its burden on any prong of this test.

First, the Legislature has already argued the merits. If this Court awards injunctive relief, it will necessarily have determined that Plaintiffs, not the Legislature, has the better of the merits argument. *See Werner*, 80 Wis. 2d at 520. By requesting a stay of an order the Court has not yet issued, the Legislature is, in essence, assuming the Court will favor Plaintiffs' position while also asking the Court to immediately reverse itself and hold that Plaintiffs will likely lose on appeal. Such contortions are unnecessary. If this Court rules in Plaintiffs' favor, the Legislature can ask the Court of Appeals for an expedited stay hearing. Wis. Stat. § 808.07; *see Waller v. Am. Transmission Co., LLC*, 2009 WI App 172, ¶5, 322 Wis. 2d 255, 776 N.W.2d 612.

[25] Available at https://www.wispolitics.com/2019/gop-lawmakers-paying-attorney-in-lame-duck-suits-at-almost-twice-the-rate-evers-paying.

Second, the Legislature has also already briefed the "chaos" it claims will engulf the State following a ruling in Plaintiffs' favor. (*See* Dkt. 103 at 29-37.) If the Court of Appeals finds such speculation compelling, it has authority to stay this Court's judgment in short order. Certainly, the hypothetical harms the Legislature predicts do not rise to the level of those in *Gudenschwager*—the only case the Legislature cites in support of its requests—where the appellate court stayed an order releasing a convicted sex offender because he was likely to engage in further acts of sexual violence. 191 Wis. 2d at 435.

Third, the harms Plaintiffs will suffer if a stay is granted are both real and imminent. Disabled individuals may be denied access to critical health care; highway workers may lose substantial income; millions of dollars of taxpayer dollars may be spent needlessly; and more. If this Court grants Plaintiffs relief, it will have credited their allegations of harm. Plaintiffs will have waited more than two months for an injunction hearing, largely because of the Legislature's strategic litigation decisions. Any further delay in relief would exacerbate Plaintiffs' harms. *See Scullion v. Wis. Power & Light Co*., 2000 WI App 120, ¶22, 237 Wis. 2d 498, 614 N.W.2d 565.

Fourth, the public interest militates against a stay here. Because this lawsuit involves an unresolved constitutional issue with significant statewide implications, the public interest favors an expeditious resolution. *See Wis. Ass'n of Food Dealers v. City of Madison*, 97 Wis. 2d 426, 431, 293 N.W.2d 540 (1980). Constitutional violations, even those committed by the Legislature, "are too material, great, and glaring" to be allowed to stand. *State ex rel. Lamb v. Cunningham*, 83 Wis. 90, 144, 53 N.W. 35 (1892). A stay, or a delay for additional briefing, perpetuates the violation.

The Legislature's requests for a stay and for further briefing should be denied.

B. This Court Should Tailor Its Judgment To Avoid Interfering with the Imminent Statewide Elections on April 2, 2019.

While Plaintiffs are confident that they are entitled to relief, they recognize the importance of not disrupting certain elections-related provisions of Act 369 with the 2019 nonpartisan elections already underway. The U.S. District Court for the Western District of Wisconsin has clarified that its injunction reaches some elections-related provisions of 2017 Wisconsin Act 369. *One Wis. Inst. v. Thomsen*, 351 F. Supp. 3d 1160, 1162-63 (W.D. Wis. 2019). The remaining elections provisions—all of which relate to overseas military absentee ballots and using technical college IDs as voter identification—are the rules under which the Spring 2019 elections have begun. There is, at this point, insufficient time to provide voters and elections official adequate notice of a change in the rules. *See, e.g.*, *Curling v. Kemp*, 334 F. Supp. 3d 1303, 1307, 1326 (N.D. Ga. 2018) (recognizing that "eleventh-hour" changes to voting procedures could "run the voting process and voter participation amuck"). Indeed, absentee ballots have already been sent to—and some possibly returned by—overseas military personnel in reliance on provisions in Act 369. Plaintiffs do not wish to cause havoc.

For that reason and in light of the scheduling order (Dkt. 85), Plaintiffs respectfully propose that any order granted should except the following provisions of Act 369 until the results of the April 2, 2019 election have been certified: Sections 1, 1B, 1C, 1D, 1E, 1F, 1FG, 1FM, 1G, 1GC, 1GD, 1GF, 1H, 1I, 1J, 1JB, 1L, 1M, 1MG, 1MP, 1MQ, 1MS, 1MT, 1MV, 1N, and 1NG.

CONCLUSION

For the foregoing reasons, the Court should deny all filed motions to dismiss and grant a declaratory judgment in Plaintiffs' favor, or, in the alternative, grant Plaintiffs' request for a temporary injunction.

Dated: March 6, 2019.

Respectfully submitted,

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